No. 18703

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

vs.

CRUZ YBARRA, HERMAN VASQUEZ, FRANK TORRES,

Appellants.

ARGUMENT IN REPLY TO APPELLEE'S BRIEF.

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In opposition to Appellee's brief, appellants contend that the facts were overwhelmingly insufficient, particularly in respect to the identification made by Agent Briggs of the voices of the appellants.

Agent Briggs identified appellant Frank Torres' voice which apparently was a necessary link in the connection of facts to support a judgment of conviction. There was no other identification of Frank Torres' voice although overheard by other witnesses.

Agent Briggs testified that it was his opinion the voice heard on the conversation of November 16, 1962, was that of Frank Torres with the qualification that he could possibly be in error [R. T. 219]. Agent Briggs testified that he did not know of the presence of Frank Torres in the parking lot at the time of the conversation on November 16, 1962, but was later so advised by other officers [R. T. 224]. Agent Briggs testified he did not

hear the voice he identified as Frank Torres until December 16, 1962, one month later [R. T. 227]. He further testified that he had never heard Frank Torres speak through a recorder [R. T. 228]. Admittedly Agent Briggs had never previously met with the appellant, Frank Torres [R. T. 235].

Since the conversation of November 16, 1962, is crucial in connecting Frank Torres to the charges set forth in the indictment it is of vital concern to consider the participants in the conversation and their identification.

Appellants contend that the facts are insufficient for the proper identification of the appellants. It would appear unlikely that a person could listen to another's voice over a radio receiver, without previous knowledge of his presence nor familiarity with the voice, having never heard it before, and not hearing that voice for a period of one month subsequently, could sufficiently establish a reasonable basis for the opinion of Agent Briggs.

Appellee set forth on page 12 of Appellee's Brief that appellant Vasquez responded to a statement with the word "yeah". Appellants contend that the identification of a voice is overwhelmingly improbable on the basis of hearing a person over a radio receiver recite the word "yeah".

The Government is taking the position that Homer is the appellant Vasquez, but overlooks the testimony of officer Velasquez wherein he testified that Homer is Shorty [R. T. 179].

Appellee argues that reference was made to a previous transaction and this was with reference to a certain amount of money which was introduced as evidence of

the transaction on October 31, 1962. Without the testimony of the special employee it would be impossible to conclude that this alleged transaction was all that had ever occurred, particularly in reference to any other dealings either a short period of time preceding October 31, 1962, or possibly to the extent of a number of years.

Appellee contends that the appellants were all present during the conversation of November 16, 1962, and there existed an acknowledgement of a sale transaction together with the indication that the conversation was conducted with the complete understanding of all present.

This position is inconsistent with the testimony by officer Weldon, that he had observed appellant Ybarra pacing up and down in the alley during this time [R. T. 39]. Agent Niblo testified that he had observed appellant Vasquez with his bright red shirt pacing back and forth in the alley [R. T. 82]. Agent Rock testified that he observed appellant Ybarra from time to time walk up to the end of the alley-way and again disappear from view [R. T. 112].

There is no evidence specifically to a definite price paid or received for any transaction, nor is the evidence sufficient to establish that $250.00 was paid to anyone on October 31, 1962.

Appellants contend that any reference to future transaction which involved bringing narcotics across the border from Mexico is insufficient to establish knowledge that narcotics involved in specific earlier transactions had been knowingly imported illegally.

Appellant Frank Torres was not seen by anyone on October 31, 1962, and November 6, 1962, and without a substantial showing of specification to these transac-

tions it would be exceedingly improbable to sufficiently establish any connection therein on his part.

Without the establishment and proof of an existing conspiracy previous to any conversation on November 16, 1962, the judgment of conviction in respect to the conspiracy should be reversed, since there was no subsequent overt acts on the part of any of the conspirators after November 16, 1962.

The special employee was identified as Ronald Varela [R. T. 13], who was under indictment at the time of the transactions involved [R. T. 118]. Agent Rock testified that the special employee was a narcotic addict based upon his personal knowledge [R. T. 118]. The death of the special employee was without cause of appellants [R. T. 270, 271].

Instructions had been given to the special employee and particularly the instruction to remain within view or sight of the officers [R. T. 36, 210]. The evidence discloses that the special employee had left the sight of the officers on both transactions of October 31, 1962, and November 6, 1962. He was furnished with $500.00 on November 14, 1962, which was never seen again, and for which no narcotic was produced, unexplained.

Without the testimony of the special employee and an opportunity by the appellants to cross-examine such testimony it would be delictately dangerous in the acceptance of such facts in the establishment of substantial proof of guilt.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examained Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

NORMAN J. KAPLAN